A

PHILOMENA MATHALAMUTHU

v.

MAYGLOBE LOGISTICS (M) SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[CIVIL SUIT NO: 22NCC-1031-2011]
17 FEBRUARY 2012

C ***CONTRACT:*** *Loan - Friendly loan - Oral agreement - Failure to repay - Whether subsistence of loan proved - Whether borrower rebutted existence of loan - Whether lender entitled to interest*

LIMITATION: *Acknowledgement of debt - Extension of limitation period - Whether letter of acknowledgement confirmed subsistence of debt - Whether limitation period extended - Whether action filed within time*

D

The plaintiff claimed against the defendant a total sum of RM379,213.61 being the monies lent by her to the defendant by way of an oral friendly loan. The plaintiff was orally promised of
E repayment within two years of the date of disbursement of the loan. The plaintiff contended that the actual amount lent to the defendant was RM362,000 and that the figure of 379,213.61 was stipulated by the defendant, allegedly with the interest element added by the defendant itself. The plaintiff relied primarily on a
F confirmation letter ('exh P2') dated 1 July 2005 issued by the defendant, acknowledging the debt and thereby extending the time for the recovery of the debt by a further six years. The defendant denied any knowledge of the loan and denied executing any agreement in furtherance of the alleged loan. The defendant also
G contended that the plaintiff's claim was time barred. The issues for the court's consideration in the instant case were, *inter alia*: (i) whether or not a loan was actually given out by the plaintiff to the defendant and if so, whether that loan was repaid; and (ii) whether the recovery of the loan was time barred under s. 6(a)
H of the Limitation Act 1953.

Held (allowing the plaintiff's claim with costs):

(1) There was clear evidence that monies were indeed paid out
I by the plaintiff to the defendant. Exhibit P2 showed that the defendant had by itself acknowledged that as of December 2004, a sum of RM379,213.61 remained due and owing to the plaintiff. This established that the defendant did indeed receive

the sum of RM362,000 from the plaintiff and the balance was interest which accrued due at the defendant's own behest. Further, there was no evidence from the defendant to rebut the plaintiff's affirmative assertions of the existence of a loan and it was evident from exh. P2 that the loan did subsist. (paras 53-55)

(2) Exhibit P2 amounted to an acknowledgement of the subsistence of the debt and had the effect of extending the period of limitation for a further six years *ie*, until 30 June 2011. In the instant case, the writ was filed on 20 June 2011 which was immediately before limitation set in. Accordingly, the action was filed within time and the debt was indeed recoverable. (para 57)

(3) It was evident that the plaintiff loaned the sum of RM362,000 to the defendant and therefore was only entitled to recover the sum loaned. The plaintiff was not entitled to the interest element added on by the defendant as the plaintiff was not a moneylender. (para 60)

Legislation referred to:
Limitation Act 1953, s. 6(a)

For the plaintiff - Joseph Iruthayam; M/s Joseph Iruthayam & Co
For the defendant - Suraeisan (ST Mani with him); M/s Vela Walter Suraeisan & Assoc

Reported by S Barathi

JUDGMENT

Nallini Pathmanathan J:

Introduction

[1] The plaintiff, an individual by the name of Philomena a/p Mathalamuthu, claims the sum of RM379,213.61 from the defendant contending that this represents the total monies lent by her to the defendant by way of a oral friendly loan granted to the defendant in or around 2003. The defendant, a private limited company, by way of defence, denies any knowledge of such a loan and denies executing any agreement in furtherance of any such alleged loan. It puts the plaintiff to proof of the existence of

any such loan. Further the defendant maintains that the plaintiff's claim is in any event time-barred, this suit having been filed in 2005. In response to this latter contention the plaintiff relies on an acknowledgement of the debt *vide* a letter dated 1 July 2005.

The Trial

[2] The trial of this matter took place over the course of half a day, the plaintiff calling three witnesses and the defendant, one. The plaintiff testified first, followed by one Thiruthanigesan a/l Gopalakrishnan ('PW2') who was, between 1998 and 2009, the Accounts Manager of the defendant and one Mohamed Shukri bin Mohamed Zain ('PW3') who was a shareholder, director of the defendant from 1994 until October 2002, and was the Managing Director of the defendant from 1996 until 2002.

[3] On behalf of the defendant, an ex-director, one Sesuratnam a/l Sevathyan ('DW1'), testified.

[4] All documents pertinent to the trial had been placed as bundles enumerated as follows:

[5] The first bundle comprising Part A documents, meaning that the contents were admitted, was marked as CBD1; Three other bundles comprising Part B documents, meaning that the maker had been dispensed with but the contents remained in dispute, were marked as CBD2, CBD3 and CBD4 while the final bundle comprising Part C documents meaning that the documents were entirely disputed in terms of maker and contents, was marked NAB. Accordingly documents in the final bundle marked NAB comprising Part C documents, when referred to, were immediately adjudicated upon in terms of admissibility.

The Background Facts

The Plaintiff's Evidence

[6] The plaintiff, Philomena a/p Mathalamuthu, ('plaintiff') testified that sometime in the year 2002, she was approached by her husband, one Loorthusamy, who was then both a shareholder and director of the defendant for a loan. On behalf of the defendant, he sought a loan from her to assist in resolving some of the defendant's outstanding financial commitments. Loans, she explained, were, to her knowledge also solicited from some of her siblings and family members to assist the defendant.

[7] The plaintiff agreed to loan the defendant monies from her savings. She maintained that she was promised orally that the monies would be repaid within two years of the date of disbursement of the loan. In support of her contention that she loaned monies to the defendant, the plaintiff relied on a copy of the general ledger of the defendant dated between 1 November 2001 and 31 December 2002. Learned counsel for the defendant objected to the admission of this document contending that the plaintiff had not explained how she had procured a copy of this ledger and as the name at the top of the ledger was 'Mayglobe Freight (M) Sdn. Bhd.' rather than 'Mayglobe Logistics (M) Sdn. Bhd.', the current name of the defendant.

[8] Learned counsel for the plaintiff responded by pointing out through a company search that 'Mayglobe Freight (M) Sdn. Bhd.' was the former name of the defendant. Additionally, the plaintiff testified that she had obtained a copy of the ledger from her husband, Loorthusamy who had been, previously, both a shareholder and director of the defendant. In these circumstances, I was satisfied both as to the origins and the authenticity of the document and allowed the copy of the ledger to be adduced in evidence, ruling that it was to be marked as exh. 'P1' and that I would decide on the probative value to be attached to the document after hearing the entirety of the evidence adduced at trial on this document.

[9] P1 evidenced the fact that in or around February 2002, the plaintiff had lent the defendant a sum of RM100,000 of which RM30,000 was repaid and subsequently a further RM60,000 was lent to the company again in or around May 2002, bringing the total to RM130,000 at that stage.

[10] The balance of the loan of RM232,000 was, according to the plaintiff granted to the defendant by way of a withdrawal of her savings from her fixed deposit accounts with both Malayan Banking Berhad and RHB Bank. She maintained that this latter sum was transferred by way of bank draft from her account to that of the defendant's. She claimed to have made available those drafts to the defendant through her husband, then a director of the defendant.

[11] The plaintiff further explained that the sum of RM130,000 was from her own savings while the sum of RM232,000 were monies given to her by her father as a gift after the sale of his

land. This totalled RM362,000. However the plaintiff's claim here is for RM379,213.61 which she explained was a figure stipulated by the defendant itself. The difference between the monies she lent and the monies now claimed, she assumed, was the interest element which the defendant itself had added.

[12] The plaintiff maintained that no written agreement was executed for the loan granted to the defendant, as it was an oral agreement based, as she put it, on 'mutual trust'. She advised that she understood that the loan would be repaid within two years from the date of disbursement.

[13] The plaintiff relied primarily on a confirmation request issued by the defendant to her dated 1 July 2005 as acknowledgement of the debt, thereby extending the time for the recovery of the debt by a further six years from that date, until July 2011. The writ here was filed on 20 June 2011.

[14] With regards to the letter dated 1 July 2005, learned counsel for the defendant again objected to its admission in evidence, notwithstanding that it was clearly a letter emanating from the defendant itself. The basis for the objection was that the defendant wanted the maker to be present. It subsequently transpired that the maker of the document was the sole witness called by the defendant. As the document emanated from the defendant itself and comprised a confirmation request, I allowed the document to be admitted in evidence and marked exh. 'P2'.

[15] The document bears the letterhead of the defendant, is dated 1 July 2005 and is entitled Confirmation Request – Mayglobe Logistics (M) Sdn. Bhd. It seeks confirmation that in keeping with its records, the defendant owes the plaintiff the sum of RM379,213.61 as at 31 December 2004. The letter, exh. P2 is addressed to 'Philomena' and bears both a company stamp and what is stated to be an authorised signature.

[16] The plaintiff testified that she received this letter and promptly signed it on the date stated therein and returned it to the defendant (rather than the auditors, as instructed). She retained a copy which comprises the basis for the plaintiff's claim that in view of this acknowledgement the limitation period for the repayment of the debt is extended for a further six years from 1 July 2005.

[17] The plaintiff also made reference in the course of her examination in chief to a statutory declaration affirmed on 8 November 2011 where she sets out her version of events pertaining to a meeting with one Selvakumara in respect of, *inter alia*, the current debt. She testified that at the meeting, she and her siblings who were present to ascertain the status of their debts with the defendant, were advised that the defendant was suffering from financial constraints and that once this situation had improved, the loan would be settled. A letter from the defendant undertaking such repayment was also promised but did not materialise, according to the plaintiff.

[18] In the course of cross-examination, the plaintiff was challenged on the subsistence of a friendly loan agreement. She replied that there was no written agreement but that it was an oral agreement. She was then asked about her evidence to the effect that *vis a vis* the first RM130,000, she had withdrawn these monies from her savings account. She was asked to produce withdrawal slips to that effect. No prior notice had been accorded to the plaintiff for the production of these documents prior to the date of trial. Notwithstanding this, the plaintiff had brought with her one of her savings account books, namely her Maybank savings account book which she readily produced. However she was unable to stipulate with any degree of certainty which entries captured the loan amounts, as a perusal of the savings book, marked as 'P5' showed numerous withdrawals of small amounts of monies. The plaintiff however maintained that while some of these monies had come from her Maybank savings account the rest had been from her RHB Bank account which she had not brought to court.

[19] She further explained that monies were transferred directly from her account to that of the defendant by way of bank drafts, in two tranches. She also explained that the loan had been sought on behalf of the defendant by her husband, then the operations director, one Sesuratnam, her brother and another director Mohd. Shukri. She maintained that she had spoken to all of them. However there was no formal letter requesting for a loan. The entire transaction had been conducted orally. No security was afforded for the loan either.

[20] She was asked what steps she had taken to collect this loan which had been given initially as early as 2003. She stated that she had asked for a return of the loan through her husband, Mr. Loorthusamy, who was then a director of the defendant.

[21] She was then asked why her claim was for RM379,213.61 and how she had derived this figure. Again she explained that the figure had in fact been forwarded by the defendant itself and that the defendant had added on interest. She conceded that she had no money lending licence.

[22] She was queried as to how she had procured the general ledger, exh. P1 and explained that her husband had obtained a copy for her use. She maintained that it merely disclosed the initial monies she had loaned to the defendant in 2002. Similarly with exh. P2, the acknowledgement letter dated 1 July 2005, she confirmed that her husband had brought it home for her signature. Her husband resigned as a director in October 2010.

[23] She was next cross-examined on the meeting she said had been held at the defendant's offices and comprising the subject matter of her statutory declaration. The plaintiff maintained her stance on the same. She was then questioned on the letter signed by her husband and Sesuratnam whereby they agreed to indemnify the defendant for any losses suffered by the company in relation to loans accorded to the defendant from relatives. The letter is dated 31 December 2007. The plaintiff cried when this letter was referred to, stating that her husband had not told her about this letter at the material time and that she only came to know of it recently in the course of this litigation.

[24] I found the plaintiff to be essentially a witness of truth. Her evidence was straightforward and clear. Her testimony remained consistent throughout.

The Evidence In Support Of The Plaintiff's Case

[25] The next witness for the plaintiff, Thiruthanigesan a/l Gopalakrishnan, PW2 was at all material times, between October 1998 and July 2009, the accounts manager of the defendant. He explained that he was in charge of the overall accounts of the defendant during this time.

[26] He essentially corroborated the plaintiff's version of events testifying that the defendant had requested for additional funds to meet its financial obligations and to improve on its haulage business. He claimed that the then Board of Directors at a meeting unanimously agreed to obtain loans from Loorthusamy's family members. He stated that he was aware of the loans granted to the defendant by the plaintiff. He confirmed that the total amount loaned by the plaintiff was RM362,000 and that the rest was interest accorded by the defendant to her. He referred to the general ledger to state that initially a sum of RM130,000 was loaned by her and that subsequently by way of bank draft, a further sum of RM232,000 was made available. He testified that the general ledger had been prepared by him and that he was the one who had recorded it as a loan. PW2 confirmed that there was no written agreement but that the entire arrangement had been conducted orally. He further confirmed that the loan had never been repaid.

[27] With respect to exh. P2, the confirmation letter of 1 July 2005, acknowledging the debt due to the plaintiff and seeking confirmation of the same, he asserted that the letter had been prepared by him on the instructions of the defendant's auditors. After the plaintiff had executed the same and returned it to the company, he maintained that it was passed to the auditors for their records as amounting to an audit confirmation. He was asked where the original was and maintained that it was with the auditors.

[28] PW2 was then asked who had signed exh. P2 on behalf of the defendant. He affirmed that Sesuratnam, one of the then directors had signed the letter. He also confirmed that it was normal practice for the auditors to seek confirmation on a random basis from varied trade creditors annually.

[29] In the course of cross-examination, PW2 was asked about his employment with the defendant and the scope of his duties. He confirmed that the overall accounts came within the purview of his duties.

[30] He maintained that he was aware of the loans as in 2002 the defendant had sought to venture into the haulage business and required additional funds. Accordingly a decision had been

taken to ask Mr. Loorthusamy and family for a loan to start the new business. At that time, Loorthusamy and Sesuratnam were both on the board of directors.

[31] He was queried about the general ledger and asked whether there was further proof of the loan. He replied that if the defendant's accounts were examined then he would be able to ascertain this. He was asked if he prepared a receipt for the loan given by the plaintiff. He stated that no receipt was issued.

[32] PW2 was then queried on the confirmation letter, exh. P2 and asked why, if it was issued for the year 2005 it was not issued regularly or annually thereafter. PW2 explained that each year, the auditors would randomly pick out some creditors and require him to procure confirmation which he duly did.

[33] He was asked why the letter of 1 July 2005 only bore the plaintiff's first name. He replied that they knew her by that name, and that the auditors set out the figure of RM379,213.61. He insisted that he merely followed the precise listing given by the auditors. PW2 stated that he passed it to the plaintiff to get her to sign it.

[34] PW2 was then referred to two warning letters issued midway through his tenure with the defendant. It was then put to him that by reason of the same, he was not telling the truth *vis a vis* the confirmation letter, exh. P2. PW2 insisted that exh. P2 was correct.

[35] He was then queried on the basis on which he had keyed in the sums into the general ledger. PW2 maintained that he had done so on the basis of bank-in slips which amounted to evidence of the loan. He explained that at the time, in view of his position, all monies to the defendant went through him. He maintained that he was not in possession of any ledgers whatsoever. He was asked who he reported to and he advised that it was Mr. Sesuratnam the Finance Director.

[36] I found PW2 to be consistent in the course of his testimony. His evidence was direct and clear. He had no personal interest in the matter at hand. His evidence clearly corroborated that of the plaintiff.

[37] The next witness for the plaintiff, one Mohamed Shukri bin Mohamed Zain, PW3 was both a director and shareholder of the defendant from 1994 until 2007. He confirmed the subsistence of the loan from the plaintiff to the defendant, explaining that at the time the defendant needed funds to finance its entry into the haulage business. It was unanimously agreed by the directors that loans were to be procured from Loorthusamy's and Sesuratnam's family members. He confirmed that this was agreed upon at a meeting of the defendant's directors then comprising himself, Loorthusamy, Sesuratnam, one Tengku Shahliza and one Mohd Aliq.

[38] PW3 confirmed that the total amount of the loan afforded by the plaintiff was RM362,000 while the rest of the claim comprised interest given by the defendant. He confirmed that an initial sum of RM130,000 was made available followed by bank draft/s for the balance RM232,000 in two tranches. He further confirmed that there was no written agreement. It was an oral agreement based on mutual trust, as the plaintiff was Loorthusamy's wife. PW3 also confirmed that as of 2007, when he resigned, the loan had still not been repaid.

[39] He was shown exh. P2 and confirmed that the signature on the document belonged to the then Finance Director, Sesuratnam.

[40] In the course of cross-examination, it was put to him that the quantum claimed by the plaintiff was in excess of the sum loaned. He accepted that there was a difference which was attributable to interest. He was asked whether any resolution was passed by the five directors to procure the loan from the plaintiff. He stated that no such resolution was passed. He denied that this was odd because the board of directors then were also the shareholders and therefore controlled the entire company. Moreover they were requesting these loans from family members and not financial institutions. Hence he maintained that given the circumstances, it was not unusual.

[41] PW3 was then shown loans made by other family members of the directors which had been documented and he was asked why the same was not done for the plaintiff. He replied that if the lender required it they would have done so.

[42] PW3, like PW2 and the plaintiff tendered his evidence in a straightforward manner with no hesitation. I found his evidence to be consistent.

[43] The plaintiff then closed its case and the defence called its sole witness.

The Case For The Defence

[44] The sole witness for the defence was a previous director of the defendant, Sesuratnam a/l Sevathyan, DW1. He was appointed a director of the defendant on 10 August 1994 and resigned sometime in 2007. In his examination-in-chief he traced his shareholding in the defendant from appointment to resignation, although the relevance of doing so is not entirely clear.

[45] DW1 also referred to the letter of undertaking signed by himself and Mr. Loorthusamy issued to the defendant dated 31 December 2007. He confirmed the contents of the letter and advised that he had received the list of dividend payments set out since 2004.

[46] DW1 then referred to the consolidated balance sheet for the year ending 2003 and confirmed that nowhere in the report is it stated that the plaintiff is owed monies by the defendant.

[47] He was next referred to exh. P2 and somewhat hesitantly confirmed that the signature on the document was his. He stated that he signed many documents in his capacity as Finance Director and stated that the signature looked like his. His hesitation in responding to this question was palpable.

[48] He next testified that PW2 was the accounts manager and was instructed by Mr. Loorthusamy on the monitoring of the defendant's bank accounts etc.

[49] In the course of cross-examination, DW1 was asked about his signature on various documents exhibited at trial. He readily acquiesced to the fact that all the documents referred to bore his signature. He was then referred to exh. P2 and asked who 'Philomena' was. He stated that she was Mr. Loorthusamy's wife. He confirmed that he was aware that she was the plaintiff and that her claim was premised for the recovery of monies loaned to the defendant. He also accepted that exh. P2 was a document confirming the amount due to the plaintiff. When asked whose signature appeared immediately below the defendant company's name stamp, he stated that it was a photostat copy of what appeared to be his signature. When asked whether he disputed

the fact that it was his signature, he confirmed that this was not in dispute. In short DW1 accepted that his signature appeared on exh. P2.

[50] With that the defence stated that it was calling no further witnesses as the defendant would rely on its audited accounts between 2003 to date to establish its stance that there was no debt due and owing by the defendant to the plaintiff.

[51] The defence then closed its case.

Issues

[52] The issues that arise for consideration in this case are as follows:

(i) Whether or not a loan was actually given out by the plaintiff to the defendant and if so, whether that loan was repaid;

(ii) Whether the recovery of the loan is time barred under s. 6(a) of the Limitation Act 1953

Issue (i): Whether Or Not A Loan Was Actually Given Out By The Plaintiff To The Defendant And If So, Whether That Loan Was Repaid

[53] Having reviewed the evidence it is clear that monies were indeed paid out by the plaintiff to the defendant. This is borne out by the evidence of the plaintiff, PW2, PW3 and even the defendant's witness, DW1. The documentary evidence to support this is to be found in exh. P1, the excerpt from the general ledger of the defendant evidencing the receipt of a part of the loan monies in the sum of RM130,000 which is described as a loan from the plaintiff.

[54] Although there is no such similar documentary entry for the balance of the loan monies, it is evident from exh. P2 that the defendant itself acknowledged on 1 July 2005 that as of December 2004 a sum of RM379,213.61 remained due and owing to the plaintiff. This establishes that the defendant did indeed receive the sum of RM362,000 from the plaintiff. As all the plaintiff's witnesses testified, which evidence I have no reason not to accept, the balance was interest which accrued due at the defendant's own behest.

[55] The defendant's evidence while putting the plaintiff to proof, does not in any way negate the evidence adduced by the plaintiff. Save from the absence of a specific reference to the loan monies afforded by the plaintiff in the consolidated accounts, the defendant points to nothing else nor produces any evidence to rebut the plaintiff's affirmative assertions of the existence of a loan. In any event, these consolidated accounts carry a general entry relating to all current liabilities in total, and there is nothing to suggest that the plaintiff's debt does not comprise a part of this total quantum of 'current liabilities'. Given the existence of exh. P2, the acknowledgement of the debt owed to the plaintiff for auditing purposes, it is evident that such a loan does in fact subsist. The fact that the said exhibit was signed by the defendant's sole witness who testified that he did in fact sign the letter puts this matter beyond issue.

[56] The evidence of the plaintiff's three witnesses bears out the fact that such loan remains unpaid. There is again no evidence to rebut or negate this evidence.

Issue (ii): Whether The Recovery Of The Loan Is Time Barred Under s. 6(a) Of The Limitation Act 1953

[57] The sole proposition available to the defendant in defence of this claim, namely that its recovery is time barred is defeated by the subsistence of exh. P2 which amounts to an acknowledgement of the subsistence of the debt and which has the effect of extending the period of limitation for a further six years from that date. Such an addition of six years allows the plaintiff to file an action until 30 June 2011. The writ in the instant case was filed on 20 June 2011, immediately before limitation set in. Accordingly the action is filed within time and the debt is indeed recoverable.

[58] In this context it must be said that the authenticity of exh. P2 cannot be in doubt in view of the evidence of DW1 himself who confirmed signing it on behalf of the defendant, the evidence of the plaintiff who was the other signatory as well as the evidence of PW2 who confirmed the preparation of the letter on instructions from the defendant's auditors.

[59] Finally the defendant seeks to rely on a letter of undertaking signed by Mr. Loorthusamy and DW1 undertaking to repay any liabilities arising from loans afforded by their family members (see exh. P3). This however has no bearing on the claim for the recovery of the loan *vis a vi*s the plaintiff and the defendant.

[60] The preponderance of evidence bears out the fact that the plaintiff did indeed loan monies in the sum of RM362,000 commencing in 2002 to the defendant, which sum has not been repaid. The plaintiff is therefore entitled to recover the sum loaned. I am not however persuaded that the plaintiff is entitled to the interest element added on by the defendant as the plaintiff is not a moneylender. Accordingly the plaintiff is granted judgment against the defendant in the sum of RM362,000 together with interest at the rate of 4% per annum from the date of judgment until the date of full settlement.

[61] The plaintiff is entitled to the costs of this action which I fix at RM45,000.